

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES A. BROWN)	
Claimant)	
VS.)	
)	Docket No. 1,060,106
EXPRESS PERSONNEL SERVICES, INC.)	
Respondent)	
AND)	
)	
INSURANCE CO. OF STATE OF PENNSYLVANIA)	
Insurance Carrier)	

ORDER

Claimant requests review of the June 4, 2012 preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders. Claimant was denied temporary benefits after the ALJ determined that claimant had failed to sustain his burden of proof of personal injury by accident arising out of and in the course of his employment with respondent.

RECORD

This Board Member has considered the same record as did the ALJ, consisting of the preliminary hearing transcript taken on April 24, 2012, with attached exhibits and the transcript of the evidentiary deposition of Phillip Heath, taken on May 3, 2012, with attached exhibits.

ISSUES

The ALJ found claimant failed to prove that he suffered an accidental injury arising out of and in the course of his employment with respondent. The ALJ specifically determined that claimant's testimony about the accident and how he notified the employers lacked credibility. Claimant testified that he told both Tom, the supervisor and Chuck, claimant's leader, of the accident on the day it occurred. Yet, claimant continued to work for the remainder of his shift. Additionally, when claimant sought medical treatment, instead of requesting medical treatment from his employer, he went to his own family doctor. These contradictions, along with the testimony of respondent's owner, Phillip

Heath, convinced the ALJ that claimant had failed to satisfy his burden of proving that he suffered an accident arising out of and in the course of his employment with respondent.

While the ALJ's comment regarding whether claimant timely notified the employers of the accident was contained in the Order, no specific finding on the issue of timely notice was included in the June 4, 2012 Order. Also, as neither Tom nor Chuck testified, claimant's testimony as to the giving of timely notice of his accident is un rebutted.

The issue for Board determination is whether claimant suffered a work-related accident, which arose out of and in the course of his employment with respondent. Should this matter be reversed with regard to whether claimant suffered an accident which arose out of and in the course of his employment with respondent, the matter will be remanded to the ALJ for a specific determination on the issue of timely notice, as well as the undecided issues of whether claimant was ever an employee of respondent, claimant's request for temporary total disability compensation and his request for current and future medical treatment.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Prior to December 28, 2011, claimant contacted Great Plains Manufacturing (Great Plains) about a possible job. Great Plains is a sister company to Land Pride, both clients of respondent, Express Employment Professionals (Express), a temporary employment agency. Claimant was advised by Great Plains that he would have to be hired through Express as that company provided the work force for both Great Plains and Land Pride.

Claimant interviewed with Phillip Heath, the owner of Express on December 28, 2011, filling out several employment related documents in the process. Mr. Heath then began the process of checking claimant's past employment background in order to determine whether claimant would be a good fit for a job with one of his many clients in the Abilene, Kansas area.

Apparently, on January 9, 2012, claimant appeared at Land Pride with several recent hires from respondent alleging that he had been hired by Express and referred to Land Pride. Land Pride's assembly supervisor, John Markby, told claimant to buy work boots and claimant began working for Land Pride. While claimant was working at Land Pride's facility, his actual employer was Express. Approximately two weeks later, on January 19, 2012, Mr. Heath noticed a payroll document for James Brown. The pay checks for Great Plains and Land Pride employees were generated at Express and were either picked up by the employee, delivered to Land Pride and Great Plains for distribution or mailed to the employee by Express. Mr. Heath attempted to contact claimant, instead reaching his mother. He also contacted Land Pride and advised that claimant had not

actually been hired and had not been referred by Express to Great Plains or Land Pride. Mr. Heath was told that claimant was doing fine on the job and that Land Pride would keep him as an employee.

Mr. Heath testified that claimant contacted Express, complaining that his first check had not been received. Claimant requested that a replacement check be issued. When Mr. Heath checked with the bank, it was determined that the check had been endorsed and cashed. He decided that claimant had just made a mistake regarding the check. No action was taken at that time.

On January 25, 2012, claimant came to work at 6:00 a.m., but left at around 9:00 a.m. with back pain. The record conflicts regarding whether claimant advised that the pain was work-related or whether claimant told Land Pride employees that it occurred at home.

According to Mr. Heath, prior to January 25, 2012, claimant had been involved in an incident at Land Pride where he repeatedly requested the phone number of a female co-worker. These incidents were reported to Land Pride and claimant was initially counseled to leave the lady alone. It was reported that claimant did not heed the warning, instead again requesting the lady's phone number. At that time, it was determined that claimant's actions amounted to harassment and claimant was terminated from his employment with Land Pride.

Shortly after the termination, claimant's mother contacted Express, complaining that claimant had again not received his paycheck. Mr. Heath again contacted the bank, finding that the check had been endorsed and cashed. This check was endorsed by both claimant and his mother. Mr. Heath speculated that perhaps claimant's mother had the bank account, thus the dual endorsement. At this point, Mr. Heath determined that perhaps the request for a duplicate check was a scam as the check had been cashed prior to the time of the phone call.

Respondent received phone calls from claimant on both January 25 and January 26, 2012, advising that claimant was available for work. Mr. Heath was unaware that claimant had claimed or was claiming a work-related injury until he began receiving medical bills from the Abilene Hospital in mid February, 2012. He immediately contacted John Markby, the Land Pride assembly supervisor, and was told that John had received no report of an accident from claimant.

Claimant was first examined by William L. Short, M.D., on February 2, 2012. Claimant reported an injury on January 25, 2012, while lifting at Land Pride. It was reported that claimant was being treated for priapism prior to beginning work for respondent and continued that treatment. Claimant also complained of left flank and lumbar pain which the doctor stated was secondary to muscle strain. Claimant was referred for physical therapy and provided pain medication. A CT scan of the thoracic

spine on February 7, 2012, displayed only mild degenerative changes of the thoracic spine. No protrusion, bulge or stenosis was found. A CT scan of the lumbar spine found dessication of disk material and disk space narrowing from L2-3 through L4-5. No spinal stenosis or significant central spinal canal encroachment was found.

Claimant appeared at the Memorial Hospital emergency room in Abilene, Kansas on February 7, 2012, claiming muscle spasms in his back and pain down his left leg. The admissions note at 10:30 a.m. discussed the fact that claimant "smells of alcohol".¹

Claimant began attending physical therapy on February 6, 2012, with gradual improvement shown. However, the notes of February 17, 2012, from Occupational Health Partners, LLC discussed a physical therapy session when claimant received ice treatment, after which his left side was unable to bear weight and claimant collapsed at the desk. He was then referred to the ER and received injections of pain killers and muscle relaxants. Claimant was ambulating with the aid of a cane at that time. An MRI taken on February 13, 2012, of both the thoracic and lumbar spines, failed to show any disc disease or stenosis that would cause the pain/numbness being described by claimant. Physical therapy notes from March 5, 2012, indicated that claimant was able to reach within one inch of the floor and was ambulating without difficulty.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(f)(1) states:

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

¹ P.H. Trans., Cl. Ex. 4 at 6 (ER Nursing Record).

K.S.A. 2011 Supp. 44-534(a)(2) states in part:

A finding with regard to a disputed issue of whether the employee suffered an accident , repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

Claimant alleges an accident on January 25, 2012, while working for Land Pride. The investigation conducted by Phillip Heath, respondent's owner failed to support claimant contentions. Neither respondent, nor Land Pride were aware of the alleged accident. Additionally, when claimant first sought medical treatment, he went to his own doctor, rather than requesting medical treatment from respondent.

There are several entries into this record that cast doubt on claimant's credibility. The repeated requests for replacement checks, after claimant's original pay checks were already cashed creates a question in this Board Member's mind regarding the legitimacy of claimant's intentions. The events leading up to claimant's hire also create concern as to claimant's actions and motivation. Finally, the ALJ specifically found that claimant lacks credibility. This Board Member acknowledges that there is evidence in this record to support claimant's claim of a work-related accident. However, where the record is in such conflict, the credibility of the witnesses plays a vital part in determining what actually happened. Here, the ALJ clearly doubted claimant.

The Board has many times concluded that some deference may be given to an ALJ's findings and conclusions on witness credibility as he or she is in the unique position to evaluate the witnesses' credibility by personally observing their testimony. In this instance, the lack of credibility of claimant defeats his claim. Claimant has failed to prove that he suffered personal injury by accident which arose out of and in the course of his employment with respondent. The denial of benefits herein is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

² K.S.A. 2011 Supp. 44-534a.

CONCLUSIONS

Claimant has failed to satisfy his burden of proving that he suffered personal injury by accident which arose out of and in the course of his employment with respondent. The denial of benefits herein is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated June 4, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2012.

HONORABLE GARY M. KORTE
BOARD MEMBER

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Rebecca Sanders, Administrative Law Judge